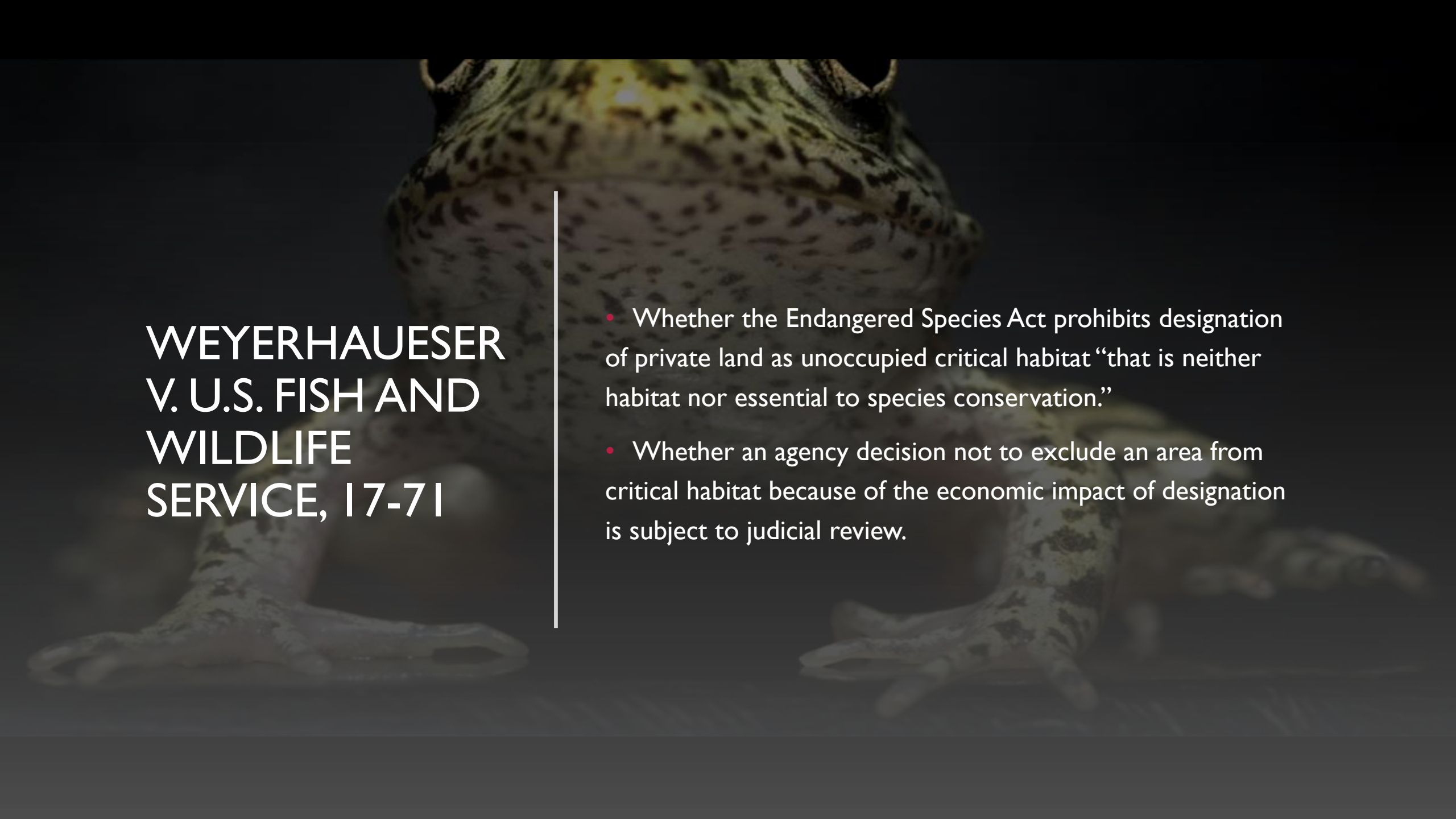


# CRITTERS AND ADMINISTRATIVE RECORDS

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THE STATE OF THE ENDANGERED SPECIES ACT IN 2018



# WEYERHAUESER V. U.S. FISH AND WILDLIFE SERVICE, 17-71

- Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat “that is neither habitat nor essential to species conservation.”
- Whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

# ESA LISTINGS ANNUAL AVERAGE

ESA list president	Total	Annual average
Trump	14	7
Obama	357	37
Bush II	62	8
Clinton	523	65
Bush I	232	58
Reagan	254	32
Carter	159	40

# FOIA AND ADMINISTRATIVE RECORDS

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- October 10, 2017 DOJ Memo

The United States' view of the scope of the administrative record is explained at pages 12–19 of the *Price* petition. To summarize, the proper scope of the administrative record in an APA action is “bounded by the proper scope of administrative review.” Pet. 13. Absent a “strong showing of bad faith,” administrative review is limited to an agency’s stated reasons for its decisions, rather than an interrogation of the agency’s subjective motives. *Id.* 13–14. But because inquiry into the agency’s internal deliberations is immaterial to the purposes of record-review litigation, and would chill free and frank agency deliberation, **deliberative documents are not properly considered part of the administrative record. *Id.* at 15. As such, deliberative documents generally should not be produced as part of the administrative record filed with a court, nor listed in a privilege log.**

While it may be appropriate in unusual circumstances for an agency to produce deliberative materials as part of an administrative record, any decision to do so should proceed mindful that inclusion of deliberative materials is a deviation from the usual rule and may serve as a harmful precedent in other cases. Agencies should consult with DOJ attorneys to determine whether special reasons for deviating from the usual rule apply in any particular case or jurisdiction. We also suggest that agencies consider reviewing their existing regulations and guidance for consistency with the position expressed herein. Questions regarding this guidance may be directed to the Law and Policy Section of ENRD.



----- Forwarded message -----

From: **Fahey, Bridget** <[bridget\\_fahey@fws.gov](mailto:bridget_fahey@fws.gov)>

Date: Thu, Sep 6, 2018 at 12:37 PM

Subject: Skinny Administrative Record/FOIA Guidance

To: FWS ES Regional ARDs <[fws\\_es\\_regional\\_ards@fws.gov](mailto:fws_es_regional_ards@fws.gov)>, FWS ES Deputy ARDs <[fws\\_es\\_deputy\\_ards@fws.gov](mailto:fws_es_deputy_ards@fws.gov)>, Susan Jacobsen <[Susan\\_Jacobsen@fws.gov](mailto:Susan_Jacobsen@fws.gov)>, Alisa Shull <[alisa\\_shull@fws.gov](mailto:alisa_shull@fws.gov)>, Sarah Quamme <[Sarah\\_Quamme@fws.gov](mailto:Sarah_Quamme@fws.gov)>, Aaron Valenta <[Aaron\\_Valenta@fws.gov](mailto:Aaron_Valenta@fws.gov)>, Don Morgan <[Don\\_Morgan@fws.gov](mailto:Don_Morgan@fws.gov)>, Gina Shultz <[Gina\\_Shultz@fws.gov](mailto:Gina_Shultz@fws.gov)>, Drew Crane <[drew\\_crane@fws.gov](mailto:drew_crane@fws.gov)>, Jeff Newman <[jeff\\_newman@fws.gov](mailto:jeff_newman@fws.gov)>, Marilet Zablan <[marilet\\_zablan@fws.gov](mailto:marilet_zablan@fws.gov)>, Marjorie Nelson <[marjorie\\_nelson@fws.gov](mailto:marjorie_nelson@fws.gov)>, Martin Miller <[martin\\_miller@fws.gov](mailto:martin_miller@fws.gov)>, Long, Michael <[michael\\_long@fws.gov](mailto:michael_long@fws.gov)>, Merritt, Timothy <[timothy\\_merritt@fws.gov](mailto:timothy_merritt@fws.gov)>, Aubrey, Craig <[craig\\_aubrey@fws.gov](mailto:craig_aubrey@fws.gov)>, Frazer, Gary <[gary\\_frazer@fws.gov](mailto:gary_frazer@fws.gov)>  
Cc: Parks Gilbert <[parks\\_gilbert@fws.gov](mailto:parks_gilbert@fws.gov)>, Eileen Harke <[eileen\\_harke@fws.gov](mailto:eileen_harke@fws.gov)>, Carey Galst <[Carey\\_Galst@fws.gov](mailto:Carey_Galst@fws.gov)>

Hello folks. I am transmitting guidance on applying the deliberative process privilege in our FOIA responses, as well as some related documents. In light of the administrative records direction from the Department of Justice last fall, we decided it was necessary to provide additional guidance on how to respond to FOIA responses so that we are not releasing information in FOIA that would undermine our positions taken in litigation via the administrative records. The attached guidance had input from regional staff, our solicitors, and the FWS FOIA Officer. We also discussed it on an ES Chiefs call earlier this year. We would like you to please begin following the guidance as of today.

If you have questions, please contact Carey Galst, Parks Gilbert, or Eileen Harke in the Branch of Listing Policy and Support. We are also considering offering a webinar later this year to explain how we approach FOIAs in HQ -- let us know if you are interested in such a webinar.

Thank you!

**Bridget Fahey**

To prevent such issues from arising, in responses to FOIAs, FWS personnel should carefully review responsive documents for deliberative process privilege applicability. If deliberative process privilege could apply, they must then evaluate whether disclosure of any identified deliberative documents could cause the FWS foreseeable harm (defined in the December 29, 2017, DOI FOIA Memo described above). If we do not reasonably foresee harm in release and no other exemptions apply, the document must be released. In other words, the guidance is not to simply withhold all deliberative information from a FOIA response. Further, there may be individual instances in litigation when the DOJ trial attorney and SOL attorney assigned to the matter advise that we include particular deliberative documents in the AR to make sure that our decision is adequately explained, as per direction from the acting solicitor that followed DOI's

# DISCOVERY

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- N. Plains Res. Council v. Shannon, No. CV-17-31-GF-BMM, 2017 U.S. Dist. LEXIS 193562 (D. Mont. Nov. 22, 2017) – allowing limited discovery on ESA citizen suit claims challenging Keystone XL pipeline
- Riverkeeper v. United States Army Corps of Eng'rs, No. 6:17-cv-00801-MC, 2018 U.S. Dist. LEXIS 32521 (D. Or. Feb. 28, 2018) – allowing limited discovery on ESA citizen suit claims challenging management of hatcheries
- Ctr. for Biological Diversity v. Ross, Nos. 18-cv-112, 18-cv-283, slip op. (D.D.C. Oct. 4, 2018) – claims alleging violations of Sec. 7(a)(2) and Sec. 9 of the ESA in connection with lobster fishery are not limited to the administrative record and that we're entitled to discovery to prove those claims